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7 **IN THE UNITED STATES BANKRUPTCY COURT**
8 **FOR THE DISTRICT OF ARIZONA**

10 In re:
11 LEEWARD HOTELS, L.P., an Arizona Limited
12 Partnership,
13
14 Debtor.

In Proceedings Under Chapter 11

Case No. B-99-09162 ECF-GBN

**SUPPLEMENTAL BRIEF REGARDING
TEMPORARY ALLOWANCE OF SECURED
LENDER'S CLAIMS**

Date of Hearing: May 4, 2000

Time of Hearing: 11:00 a.m.

17
18 LASALLE NATIONAL BANK, in its capacity as Trustee for the registered holders of DLJ
19 Mortgage Acceptance Corporation, Commercial Mortgage Passthrough Certificates, Series 1997-CF1,
20 by and through its Servicer, Lennar Partners, Inc. (the "Secured Lender") hereby files its Supplemental
21 Brief with respect to the "Motion Of Secured Lender For Temporary Allowance Of Secured Lender's
22 Claim" filed on April 21, 2000 (the "Temporary Allowance Motion").

23 The reason for the filing of this Supplemental Brief is straightforward.

24 **1. Proofs Of Claim/Claims Objection** The Secured Lender filed eleven (11) proofs of
25 claim supported by five (5) volumes of the Secured Lender's loan and security documents (including
26 security instruments that contained appropriate recording and/or other perfection information). The
27 Debtor filed an objection to the secured claim of the Secured Lender based upon three (3) specific issues
28 (consisting of an objection to the allowability of a yield maintenance charge, escrow reserves, and a

1 concern that the Secured Lender's allowed secured claim is limited by the value of collateral). Those
2 are the only bases set forth in the Claims Objection. See "Objection To Proofs Of Claim Filed By
3 Lennar" filed by the Debtor on April 7, 2000 (the "Claim Objection").¹

4 **2. Motion For Temporary Allowance.** As required by the Stipulated Order, the Secured
5 Lender timely filed its "Motion For Temporary Allowance Of Secured Lender's Claim" on April 21,
6 2000 (the "Temporary Allowance Motion"), responding to the specific issues raised in the Claims
7 Objection. See also Stipulated Order, ¶2.

8 **3. Debtor's Newly Asserted Claims Objection.** On April 28, 2000, the Debtor filed the
9 "Objection To Plan Of Reorganization Filed By Lennar Partners" (the "Plan Objection") in which the
10 Debtor has taken the position that:

11 ...[I]t appears the only impaired creditor which will vote to accept the
12 Lennar Plan is Lennar. *It is unlikely Lennar will be able to vote. It*
13 *cannot have an allowed claim under Section 502(d) since it has received,*
14 *and has failed to disgorge, voidable transfers pursuant to 11 U.S.C.*
15 *§ 547. As a result, Lennar's vote cannot be considered for purposes of*
16 *Section 1129(a)(10).*

See Plan Objection at 3:10-13 (emphasis added).

17 **4. Ballots Cast.** On April 28, 2000, the Secured Lender timely filed its ballots accepting
18 the Secured Lender's Plan, and rejecting the Debtor's Plan. While the Debtor's Claim Objection does
19 not reference Section 502(d) as a specific claims objection, it is clear that the Debtor will be taking the
20 position that it will not have to count any of the rejecting ballots by the Secured Lender as a result of its
21 interpretation of Bankruptcy Code § 502(d) as set forth in the Plan Objection. Since there will be a
22 hearing on the Temporary Allowance Motion on May 4, 2000, and in an effort to avoid needless
23 subsequent litigation, the Secured Lender is filing this Supplemental Brief as the caselaw is controlling
24 and unequivocal.

25 **5. The Secured Lender's Votes Are Not Disallowed By Virtue Of The Mere Filing Of A**
26 **Preference Action.** The Debtor will clearly take the position (although it did not mention this in its

27 ¹ The Claim Objection was filed pursuant to this Court's "Stipulated Order Establishing Schedule In Advance Of
28 Joint Hearing To Consider Confirmation Of Competing Plans Of Reorganization" dated March 16, 2000 (the "Stipulated
Order"), and specifically ¶1 thereof.

1 Claim Objection) that it will be able to disregard the rejection votes of the single largest creditor in this
2 case (representing in excess of 80% of all claims in the case) based upon the interpretation of
3 Bankruptcy Code § 502(d)). Specifically, the Debtor asserts that the mere fact that it filed a preference
4 action on January 4, 2000,² allows it to disregard any rejection of the Debtor's plan by the Secured
5 Lender pursuant to Bankruptcy Code § 1126(a).³ The Debtor has also taken the position that the
6 accepting ballots of the Secured Lender relating to its Plan likewise should be disregarded.

7 In the Ninth Circuit, the mere filing of a preference or other avoidance action does not invoke the
8 disallowance provisions of Bankruptcy Code § 502(d). In fact, before Section 502(d) is invoked, the
9 Debtor must succeed in *establishing* a preference—the mere assertion of it is simply insufficient. *See In*
10 *re Parker North American Corporation*, 24 F.3d 1145, 1155 (9th Cir. 1994) (“*If successful in*
11 *establishing preference liability*, [the Debtor] will invoke Section 502(d) of the Code, which requires the
12 Bankruptcy Court to disallow claims asserted by a creditor who has received a preferential transfer
13 unless the creditor disgorges the preference payments. 11 U.S.C. § 502(d)”). *See also In re Atlantic*
14 *Computer Systems*, 173 B.R. 858 (S.D.N.Y. 1994), in which District Judge Haight opined:

15 The Fifth Circuit's interpretation of Section 502(d) [in *In re Davis*, 889
16 F.2d 658 (5th Cir. 1989)] is supported by *Collier On Bankruptcy*. That
17 treatise describes the operation of Section 502(d) as follows:

18 *Once the liability of the transferee has been determined, the claim*
19 *interposed by the transferee will be disallowed unless such*
20 *transferee gives effect to the judgment flowing from the exercise of*
21 *the avoiding powers described above. 3 Collier On Bankruptcy,*
22 *¶502.04 (15th edition 1993) (emphasis added).*

23 *That description clearly envisioned some sort of determination of the*
24 *claimant's liability before its claims are disallowed, and in the event of an*
25 *adverse determination, the provision of some opportunity to turn over the*
26 *property.*

27 *Id.* at 861-862 (emphasis supplied).

28 ² See “Complaint” filed on January 4, 2000 as Adversary No. 00-11.

³ Bankruptcy Code § 1126(a) provides that only the holder of an “allowed” claim under Bankruptcy Code § 502 may vote with respect to the plan of reorganization.

There is good reason for this rule of law. The Secured Lender has filed the “Answer Of LaSalle National Bank To Preference Complaint” on January 31, 2000 in which it asserts: (1) that one of the payments received was outside of the 90-day preference period; (2) the transfers asserted in the original Complaint were in the ordinary course of the Debtor’s business; (3) the transfers were not on account of an antecedent debt but were given for new value; (4) the Secured Lender was not the initial transferee of those payments; and (5) with respect to the payments received, the Secured Lender received those payments for value, in good faith and without knowledge of the voidability of the transfer pursuant to and in accordance with Bankruptcy Code § 550(a)(1); (b)(i). Moreover, in the Answer the Secured Lender asserts that the Complaint fails to state a claim upon which relief can be granted. As such, this asserted preference action will be vigorously defended.

This Debtor cannot disenfranchise the single largest creditor in this case by filing a perfunctory preference lawsuit and then asserting that the mere pendency of this adversary proceeding precludes the defendant (without any adjudication of that adversary proceeding) from voting on a plan. It is not the law.

6. Need For Prompt Determination. The parties must file Ballot Reports by **May 8, 2000**. Given the Debtor's clear statement of its position, this issue should be addressed at this time. If it is not, there will be ancillary litigation over the Ballot Reports, with the Debtor taking the position that it can disregard the votes of the primary creditor in this case.

CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, the Secured Lender requests that the Court, as part of the Temporary Allowance Motion hearing to be held on May 4, 2000, make a ruling that the Debtor may not disregard the rejecting votes with respect to its plan (and the accepting votes with respect to the Secured Lender's plan) merely because of the existence of the unadjudicated and heavily disputed preference litigation.

RESPECTFULLY SUBMITTED this 1st day of May, 2000.

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